



The State of New Hampshire
Department of Environmental Services
Air Resources Council

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STATE OF NEW HAMPSHIRE
AIR RESOURCES COUNCIL

Decision & Order

Docket No. 04-06 ARC

Appeal of J. Duncan McCutchan
In Re: Title V Permit No. TV-OP-050

Notice of Appeal

Background

On January 28, 2004, The NH Department of Environmental Services, Air Resources Division ("DES"), issued an approval of a Title V Operating Permit to Wheelabrator Claremont Company, L.P. located in Claremont, NH.

Pursuant to NH RSA 125-C:12, a person aggrieved by the decision of the commissioner granting or denying a permit application may within 10 days of the decision file an appeal with the Air Resources Council (the "Council").

On February 23, 2004, J. Duncan McCutchan (the "Appellant") filed a Notice of Appeal with the Council. The subject of the appeal is the Title V Operating Permit to Wheelabrator Claremont Company, L.P. located in Claremont, NH.

Discussion / Conclusion

At the March 15, 2004 meeting of the Council, a vote was taken to waive NH CODE OF ADMINISTRATIVE RULE Env-AC 206.02(c) allowing the entry of the appeal. Env-AC 206.02(c) requires that pursuant to RSA 125-C:12, an appeal of a decision to grant or deny a

permit shall be filed no later than 10 days after the final date of the decision to issue or deny a permit.

Env-AC 204.01 and Env-AC 206.03 specify how to file an appeal with the Council. On February 9, 2004, the Appellant faxed a letter to DES addressed to Michelle Andy of the DES Air Resources Division. Env-AC 206.03 specifies that appeals shall be commenced by filing a notice of appeal with the Council. Env-AC 204.01 specifies that documents required to be filed with the Council shall be filed by mailing or delivering the original and 15 copies to the Council. Therefore, the Appellant's faxed letter addressed to DES did not constitute an appeal to the Council.

The Council finds that this appeal was filed with the Council on February 23, 2004, which represents the 26th day after the issuance of the permit approval. Env-AC 206.02(c) is a recitation of RSA 125-C:12,III, which establishes a statutory requirement for appeals of a decision to grant or deny a permit to be filed within 10 days. Upon advice of legal counsel, the Council does not have the legal authority to waive a deadline established by statute. And, even though under Env-AC 210.01 the Council can waive its own rules, it cannot waive a rule that simply repeats a statutory deadline.

Order

Because the Council did not have the authority to waive the deadline for the filing of the appeal, the appeal is determined to be filed on an untimely basis and is DENIED.

Reconsideration

Pursuant to Env-AC 208.01 any party aggrieved by this decision may, within 30 days from the date of this decision, petition the NH Air Resources Council for reconsideration or rehearing.

So Ordered for the Council by:


Michael Sciafani, Appeals Clerk

March 31, 2004